**[Cite as *Countrywide Home Loan Serv. v. Nichpor*, 2012-Ohio-1101.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

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| Countrywide Home Loans Servicing, L.P. | Court of Appeals No. WD-11-047 |
| Appellee | Trial Court No. 2010CV0680 |
| v. | |
| Michael Nichpor, et al. | **DECISION AND JUDGMENT** |
| Appellants | Decided: March 16, 2012 |

* * * * *

Andrew C. Clark, for appellee.

Kevin A. Heban, R. Kent Murphree, and John P. Lewandowski, for appellants.

* * * * *

**HANDWORK, J.**

**{¶ 1}** Appellants, Michael P. Nichpor and Joann M. Nichpor, in this accelerated appeal, appeal a judgment entry entered by the Wood County Court of Common Pleas granting summary judgment in favor of appellee, Countrywide Home Loan Servicing. For the reasons that follow, we affirm the judgment of the trial court.

**{¶ 2}** On February 27, 2009, appellee filed a complaint in foreclosure against appellants in a previous case, Wood County case No. 2009CV0215. The trial court in that case granted a default judgment entry and decree in foreclosure, in favor of appellee. A sheriff's sale was conducted, and a third party, Jennifer L. Reichert, was the successful bidder on the real estate. Appellee was not in attendance at the sale. After the sale, but before its confirmation, appellee filed a Civ.R. 41(A) notice of voluntary dismissal of the case. An appeal was taken from the dismissal, but was later dismissed for failure to prosecute.

**{¶ 3}** On July 16, 2010, appellee filed the instant case, requesting the same relief that had been requested in the 2009 case, and naming the same parties. Appellants filed an answer to the new complaint and, within that answer, appellants presented res judicata as an affirmative defense. Appellants and appellee subsequently filed cross motions for summary judgment. Ultimately, the trial court granted appellee's motion for summary judgment, without specifically ruling on appellants' motion for summary judgment.

**{¶ 4}** Appellants appealed the trial court's judgment, raising the following sole assignment of error:

> The Trial Court erred by not granting the Defendant-Appellants' Motion for summary judgment.

**{¶ 5}** An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule.

**{¶ 6}** Summary judgment is proper where: "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party." *Ryberg v. Allstate Ins. Co.*, 10th Dist. No. 00AP-1243, 2001 WL 777121 (July 12, 2001), citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629, 605 N.E.2d 936 (1992).

**{¶ 7}** The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*.

**{¶ 8}** In the instant case, appellants argue that the trial court erred by not granting their motion for summary judgment based upon the doctrine of res judicata. Specifically,

appellants contend that: (1) the order of foreclosure that was issued in the 2009 case was a final appealable order that dealt with the same action and same parties involved in the 2010 case, (2) a Civ.R. 41(A) voluntary dismissal does not negate final appealable judgments of foreclosure, and (3) the doctrine of res judicata acts to bar appellee's claims in the subsequently filed 2010 action.

**{¶ 9}** We deal first with appellants' claim that appellee's Civ.R. 41(A) voluntary dismissal would be legally insufficient to nullify the trial court's order of foreclosure in the 2009 case.

**{¶ 10}** Foreclosure proceedings involve two distinct phases and two distinct judgment entries: the first is the order of foreclosure, and the second is the order confirming the sheriff's sale. *Mtge. Electronic Registration Systems, Inc. v. Harris-Gordon*, 6th Dist. No. L-10-1176, 2011-Ohio-1970, ¶ 10. Both judgment entries are final and appealable. *Id*.

**{¶ 11}** In *The N. Ohio Invest. Co. v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658, this court considered a case analogous to the one at hand. *Yarger*, like the instant case, involved the issuance of a default judgment of foreclosure, followed by a sheriff's sale that was unattended by an agent for the bank, together with a Civ.R. 41(A) voluntary dismissal that was filed by the bank prior to the issuance of an order confirming the sheriff's sale. Unlike in the current case, the trial court in *Yarger* sua sponte declared the notice of voluntary dismissal a nullity and ordered it stricken from the record. The bank appealed the court's decision. This court, reversing the trial court's

decision, held that the notice of voluntary dismissal that was filed by the bank was valid and operated to terminate the case as a whole. *Id*.

**{¶ 12}** Although appellants are correct in stating that an order of foreclosure is a final and appealable order, see *Harris-Gordon, supra*, and that at least one Ohio appellate court has held that Civ.R. 60(B), and not Civ.R. 41(A), provides the only mechanism to change such an order, see *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987), this court has taken the position that a foreclosure action, with its two-part process, is a unique process under the law and that prior to completion of both parts of that process—that is, completion of both the order of foreclosure and the order confirming the sheriff's sale—an entire foreclosure action, including any previously-issued order of foreclosure, can be dissolved with the filing of a Civ.R. 41(A) voluntary dismissal.

**{¶ 13}** Based on the foregoing, we conclude that the voluntary dismissal was properly allowed in the 2009 case and effectively terminated that action in its entirety. Given this conclusion, we find that appellants' argument regarding the application of the doctrine of res judicata is not persuasive. Accordingly, it will be given no additional consideration herein.

**{¶ 14}** For all of the foregoing reasons, we find appellants' sole assignment of error not well-taken.

**{¶ 15}** The judges of the Court of Appeals of the Sixth District of the state of Ohio hereby find that the judgment entered in this case is in conflict with the judgment

pronounced upon the same question by another court of appeals, the same being the Court of Appeals for Greene County in the case of *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987).

**{¶ 16}** Wherefore, the record in this cause, *Countrywide Home Loans Servicing v. Nichpor*, is hereby certified to the Supreme Court of Ohio for review and final determination. The issue for certification is:

**{¶ 17}** Whether a foreclosure action, in which a judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to the confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

**{¶ 18}** The judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE